1963

State of Utah v. Terry D. Louden : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,	)	
	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	No. 9851
	)	
TERRY D. LOUDEN,	)	
	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a prosecution for burgla ry in the second degree.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict of guilty and judgment of conviction and sentence, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of judgment of conviction and sentence.

STATEMENT OF FACTS

In making this statement of facts the numbers in parenthesis refer to the pertinent page numbers of the record.

At about 6:00 p.m. on July 28, 1962 (75) two deputy sheriffs of Salt Lake County, Utah, acting upon an "anonymous tip" (73,74) went to a motel in Salt Lake County (74,75). They then requested and obtained permission from the motel manager to look around the motel room occupied by defendant (75). Said deputies did not have the permission of defendant (or of anyone who was renting said room) to enter said motel room (81). The deputies and the motel manager entered defendant's room, searched and found a loaded revolver in a bureau drawer in the room. After looking around the room some more they left the room and waited outside behind a large hedge until defendant and Roland D. McQueen returned to the motel room at about 6:30 p.m. (76). Thereafter the deputies went

up the stairs to the motel room (76). One of the deputies had his gun drawn as they walked up the stairs (83). One of the deputies testified that it was possible that the defendant and his companion saw that deputy (who came up the stairs with his gun drawn) co me up the stairs (87). After looking in the room and observing that defendant and his companion were unarmed, the deputy put the gun back in its holster and walked into the room (83,84) in a very assumptive manner (86). When asked whether it would have done them any good to protest, one of the deputies testified, "Well, that I don't know." As the deputies were already entering the room they asked if they could come in and look around (85,89). The deputies did not ask to look around till they were in the room (89). One of the deputies testified that before they searched, they received permission to do so from defendant and his companion (87). Thereafter the deputies searched

defendant and his companion and then they took the said gun from the drawer (87). During said search, the deputies also found a watch in a drawer and some crow bars in a closet (77). Said deputy sheriff's did not have a search warrant for any of the foregoing searches (82,83,88). Nor is there any evidence that they had an arrest warrant or that any crime was committed in their presence.

Said gun was introduced and received in evidence as exhibit S-1. The watch taken from the drawer (same drawer as gun) was introduced and received as evidence as exhibit S-2 (77,97). As a result of the said search another watch was taken from defendant's person (77) and admitted in evidence as exhibit S-2 (97) and as the result of said confession (79) a camera was obtained (80) and received in evidence as exhibit S-4 (97). The testimony tended to show that the serial number on said gun (76) was

the same as the serial number on a box which had contained a gun allegedly stolen from Harmon City Shopping Center (64,65).

Defendant moved to suppress as evidence the fruit of the foregoing search (6,8,68,71,72)but the court denied the motions (68,71,72). Defendant also made a motion at the trial that the court itself hear evidence on the issue of the illegal search and seizure and determine that question, before evidence thereon was presented to the jury (69), but the court refused to follow that procedure, and allowed the evidence to ~~initially~~ go to the jury (70). Defendant also objected to the admission of testimony regarding said search and seizure (75).

After defendant and his companion had been searched (together with the room), defendant was taken to the Salt Lake County jail (78) where he was allegedly held on another charge (92,93). One of the deputies

testified that two days later at the jail he had a conversation with defendant (78,92), and that during this conversation, which was a general conversation in which the deputy intended to get a confession (92), defendant allegedly made a confession (79,80), and thereafter in the same conversation the deputy told defendant that if he would clear up some other offenses of which he was suspected, that said deputy would not sign a complaint against him on those matters (90, 95). On August 2, 1962, three days later, the deputy sig ned a complaint against defendant for burglary before a judge of Salt Lake City (5) and a warrant of arrest was issued the same day, August 2, 1962, and defendant was arrested by virtue of said warrant on August 2, 1962 (4).

At the trial, defendant objected to the admission of evidence on the aforesaid alleged confession (67, 69). Defendant contended that the confession was

induced by a promise of leniency (69) and that the court should hear and determine whether evidence of the alleged confession was admissable (69).

Defendant's attorney stated his intention to call the defendant as a witness in the hearing before the court on the confession issue (68). The court however refused to hear and rule on the admissi bility of the confession before letting the jury hear it (71,72).

At the trial a verdict of guilty was returned against defendant (37) and defendant was ordered confined in the Utah State Prison for the indeterminate term as provided by law for Burglary in the Second Degree (44).

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN REFUSING TO HEAR EVIDENCE ON THE ISSUE OF THE COMPETENCY OF DEFENDANT'S ALLEGED CONFESSION

AND RULING THEREON BEFORE PERMITTING EVIDENCE OF THE ALLEGED CONFESSION TO BE PRESENTED TO THE JURY.

The majority opinion written by Justice Wade in the case of State v. Crank, 105 Utah 332, 142 P. 2d 178 (1943) announced the rule applicable to alleged involuntary confessions. In that case the court held at page 373:

> "We agree with the rule approved in those cases, that a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence to the jury, together with all of the evidence on the question of whether it was voluntary, and the circumstances surrounding its being made, and from such evidence the jury must determine the weight and credibility to be given it, but may not determine its competency as evidence, that being a question for the court."

This has been the rule followed by the Supreme Court of Utah ever since. See State v. Ashdown, 5 Utah 2d 59, 269 P. 2d 726 (1956), State v. Braasch

119 Utah 450, 229 P. 2d 289 (1951), State v. Mares 113 Utah 225, 192 P. 2d 861 (1948), and State v. Fraser, 107 Utah 454, 154 P. 2d 752 (1944). The same rule applies whether the volintariness of a confession comes in issue by virtue of abusive treatment or by virtue of a promise of leniency. See State v. Ashdown, supra.

The reasons for the rule are set forth in the Utah cases deciding and dealing with it, and the rule is clearly a good one. One observation should be made here, however. In State v. Ashdown, supra, the court appears to have approved the rule allowing the defendant, in the hearing before the court (in the absence of the jury) on the issue of the competency of a confession, to take the stand for the sole purpose of testifying as to that issue. See page 64 of that decision. The view that a defendant does not waive the privilege against self incrimination by taking the stand on the issue of an alleged involuntary confession only is supported

by the following cases: State v. Thomas, 208 La 548, 23 So. 2d 212 (1945) Enoch v. Comm. 141 Va 411, 126 SE 222 (1925) and Hawkins v. State 193 Miss 586, 10 So 2d 678 (1942). See also 147 ALR 255 at page 272. This is a good rule, and one which goes a long way in deterring unlawful interrogation procedures.

In this case, although the voluntariness of the alleged confession was properly raised by defendant at the trial, and although defendant's attorney proposed to call defendant as a witness in the issue of the competancy of the alleged confession as evidence the court refused to hear and rule on the issue, but rather allowed it to go directly to the jury.

This procedure materially predjudiced defendant, because it precluded the defendant from testifying on the issue of competancy. Had the court itself heard his testimony, as it should have, it might well have ruled the entire confession incompetent. Therefore it cannot be said that since the evidence presented

to the jury showed the confession to have been competant that the court merely committed a technical error which did not prejudice the defendant. The jury didn't hear all of the evidence.

Although the deputy testified that defendant confessed to the burglary before any promise of leniency was made, he did testify that the conversation was a general one and the record indicates some uncertainty even in his mind as to the order in which statements were made. The defendant should have been given an opportunity to present his testimony on that issue without waiving his privilege against self incrimination and before the confession was given to the jury. Failure to allow him to do so, and the admission in evidence of the confession and exhibit S-4, obtained as a result thereof, constitutes prejudicial error.

POINT 2

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO AN UNLAWFUL SEARCH AND SEIZURE AND IN REFUSING TO SUSTAIN DEFENDANT'S OBJECTION TO THE ADMISSION OF SUCH IN EVIDENCE.

The question of the admissability in a trial of evidence obtained as the result of an unlawful search and seizure has been a subject of controversy for many years. The prohibition against "unreasonable searches and seizures" contained in the Constitution of the United States, Amendment IV, and in the Constitution of Utah, Art. I, Section 14, is clear. What has not been so clear is what to do with evidence obtained in violation thereof. Much has been said on both sides. The Supreme Court of the United States announced the rule, that such evidence is inadmissible in federal courts, in the case of Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA 1915 B 834, Ann Cas 1915 C 1177 (1914).

This rule of exclusion has received ever expanding application since then. Until 1961 the states were free to adopt or reject the exclusion rule in state court prosecutions for state crimes. This rule was formally announced in the case of Wolf v. Colorado, 338 US 25, 93 Led 1782, 69 S Ct 1359 (1949) which held that Amendment XIVof the Constitution of the United States did not forbid the admission of evidence obtained by unreasonable search and seizure in state court prosecutions for state crimes.

Prior to 1961 the Supreme Court of Utah along with a number of other states had rejected the exclusion rule. State v. Aime 62 Utah 476, 220 P. 704 (1923) and State v. Fair 10 Utah 2d 365, 353 P. 2d 615(1960).

In 1961 the Supreme Court of the United States in the case of Mapp v. Ohio, 137 US 643, 6 Led 2d 1081, 81 S Ct 1684 (1961) overruled the case of Wolf v. Colorado, supra, and held on constitutional grounds, and not just as a rule of evidence, that:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority, inadmissible in a state court."

The court holds that the exclusion rule of Weeks v. United States, supra, to be "an essential part of both the Fourth and Fourteenth Amendments". The court further said:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the State through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

Thus the decision of Mapp v. Ohio has the effect of overruling the Utah cases of State v. Aime, supra, and State v. Fair, supra, and establishing in Utah the federal exclusion rule, the "same sanction of exclusion as is used against the Federal Government" Mapp v. Ohio, supra.

Thus this court must consider the issue of unlawful search and seizure in the light of the exclusion rules which exist in the federal courts as a minimum standard. This court can of course be as strict or

lenient as it deems proper in interpreting our state constitutional prohibition against "unreasonable searches and seizures" so long as it does not fall below the federal minimum standard.

Defendant contends that evidence obtained as a result of an unlawful search and seizure, in violation of both state and federal Constitutions, was received in evidence against him and that prejudicial error was thereby committed.

The deputies admitted that when they first entered the motel room they had no permission from defendant or anyone who was renting the room. The entry was a trespass and the search obviously unreasonable and unlawful.

The question remains, however, as to whether this unlawful search taints the second search which took place about thirty minutes later when defendant was in his room. The answer is that it does -- both on

principle and federal decision.

The case of Silverthorne Lumber Co. v. United States 251 US 385, 64 L ed 319, 40 S Ct 182, 24 ALR 1426 (1920) is a case where federal officials without authority unlawfully seized certain books and other papers. Based on information thus obtained a new indictment was framed. The items were returned after copies had been made and subpoenas issued to produce the originals. Plaintiff's in error refused, the court ordered compliance which was still refused. Contempt was adjudged and plaintiffs in error appealed The Supreme Court there held in an opinion by Justice Holmes, that to allow such a use of illegally obtained evidence "reduces the 4th Amendment to a form of words". The court further held:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and

> and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

Mapp v. Ohio, supra, cites with approval, at least three times, Silverthorne Lumber Co. v. United States, supra. It is thus clearly the present law on the question and is controlling in this case.

In the Silverthorne Case, supra, it was held that after an illegal search and seizure the government couldn't thereafter get the books and papers by lawful means (subpoena). Thus in the instant case, even if the deputies had returned with a proper search warrant, after their illegal search, they could not have seized the items of which they obtained knowledge during the unlawful search.

Under the Silverthorne case, supra, whatever facts were gained by the illegal search are not "sacred and inaccessible" but they can be proved

only if knowledge of them is gained from an "independent source". To hold otherwise would open the door to peace officers searching in secret, just like a burglar, but without taking the hazards of a burglar, because done without the interference of other peace officers. Then having found something incriminating as the result of such a "fishing expedition" return with a search warrant to make the whole thing legal. Past experience has shown that the possibility of an independent action for damages against a peace officer for such a trespass is not effective as a deterrent. If convicted, how is a defendant to finance such legal action from the penitentiary when he does not have funds to hire counsel to represent him in the criminal proceedings and must have counsel appointed for him by the court, as in this case.

It cannot be said that the gun and other items

were obtained from an "independent source". The second search was really just an extension of the first. Even assuming defendant gave the deputies permission to look around, it was given without knowledge of the illegal search. Had defendant been informed of the illegal search and that as a result the deputies could not get a search warrant (under the Silverthorne case, supra) defendant undoubtedly would not have allowed the search. Defendant cannot be said to have waived his rights arising from the illegal search and seizure without having been informed thereof. There can be no waiver without knowledge.

The foregoing arguments are particularly true in the light of the attitude of the deputies. They were "assumptive" and just walked into the room asking permission on their way, and this after having just had a gun drawn which defendant might have seen

according to the testimony. These facts alone should render the entire search and seizure illegal as constituting an implied coercion and thus rendering invalid any "consent" by the defendant. There is no waiver of an illegal search and seizure made under an implied coercion and the Supreme Court of the United States has so held, Amos v. United States 255 US 313, 41 S Ct 266, 65 L ed 654 (1921).

The admission in evidence of exhibits S-1, S-2, S-3 and S-4 and of testimony regarding the illegal search and seizure constitutes prejudicial error.

POINT 3

THE TRIAL COURT ERRED IN REFUSING TO HEAR all EVIDENCE AND RULE ON THE ISSUE OF THE COMPETENCY AND ADMISSIBILITY OF EVIDENCE OF AN ALLEGED UNLAWFUL SEARCH AND SEIZURE BEFORE PERMITTING EVIDENCE, ALLEGEDLY OBTAINED AS THE RESULT THEREOF, TO BE PRESENTED TO THE JURY.

When the issue of an illegal search and seizure was raised by the defendant, at the trial the court should have heard all the evidence bearing thereon in the absence of the jury and then made its ruling on the competency thereof. Defendant should have been permitted to testify on this issue at the trial without waiving his priviledge against self incrimination. If the court found from all of the evidence thus presented that there was no unlawful search and seizure, then the evidence should have been presented to the jury who would then determine the weight and credibility to be given to it. This situation is similar to a situation involving a confession and should be so treated. So long as this court rejected the exclusion rule, the question of how to treat such evidence did not come up. Now that we have the exclusion rule, the court should clearly announce the rule to be followed in these situations, and upon principal and for expedi[illegible] a matter should be

In cases such as the instant case, where an issue of unlawful search and seizure and of involuntary confession arise, the court could hear the evidence on both at the same time and in the absence of the jury.

POINT 3

THE TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTIONS.

As stated in Startin v. Madsen, 120 Utah 631, 237 P. 2d 834 (1951) the court has the duty " to cover the theories of both parties in his instructions."

In this case the essence of defendant's requested instructions3 to 7 was a request for a specific instruction on the confession issue. Although the request may have been technically excessive in the light of State v. Ashdown, supra, and State v. Braasch, supra, nevertheless, the court, in accordance with the spirit of the requests,should have given a specific instruction on the issue of the confession in terms like or similar to those contained in the instruction approved by this court in State v. Ashdown, supra, at pages 66 and 67 thereo:

The failure to give such an instruction constitutes prejudicial error.

CONCLUSION

Prejudical error was committed in the trial of defendant as herein set out, and the judgment and sentence of the trial court should be reversed.

Respectfully submitted,

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